PRPC UTILITIES AND FACILITIES SDN BHD v. PBJV GROUP SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
WAN MUHAMMAD AMIN WAN YAHYA JC
[ORIGINATING SUMMONS NO: WA-24NCC-113-03-2021]
1 DECEMBER 2021

Abstract – *Winding-up proceedings are not subject to or caught by an arbitration agreement. An arbitration agreement does not stop a party from presenting and proceeding with a winding-up petition. The proper test to be applied for the grant of a Fortuna injunction where there is an arbitration agreement or clause is for the applicant to establish a prima facie dispute that the debt falls within the arbitration agreement.*

COMPANY LAW: *Winding-up – Petition – Disputes between parties – Application to restrain presentation of winding-up petition – Whether winding-up proceedings subject to or caught by arbitral proceedings or arbitration agreement/ clause – Whether arbitral proceeding proper forum for parties' dispute to be determined – Impact of arbitral proceedings and arbitration – Applicable tests*

This was the plaintiff's application by way of originating summons ('OS') ('encl. 1') to restrain the defendants from presenting a winding-up petition. The plaintiff also applied for an interim *ex parte* injunction, along with the terms of prayer 2 of this OS pending the disposal of the same ('encl. 8'). The OS and encl. 8 were heard together. The defendants were awarded package work by the plaintiff to perform procurement, construction and commissioning of the underground pressurised non-metallic piping underwater network eastside ('package work'). The value of the contract awarded was RM84,148,028 ('contract price'). Arising from disputes between parties in relation to the contract, the defendants commenced an action at the High Court ('Suit 72'), claiming for, *inter alia*, the total sum of RM6,579,806.75 pursuant to progress claim no. 9 of the contract. Following an application by the plaintiff, the High Court in Suit 72 granted a stay of further proceedings of Suit 72 pending reference of the dispute to arbitration ('stay order'). Apart from Suit 72, the plaintiff issued a notice of arbitration to the defendants herein claiming for a sum of RM85,203,274.96. The arbitration between the plaintiff and the defendants were still pending ('arbitral proceeding') and insofar as the plaintiff's claims against the first defendant were concerned, it could not be proceeded with due to the restraining order granted by the High Court ('RO Suit') which arose from the first defendant's application for a proposed scheme of arrangement under s. 366 of the Companies Act 2016 ('Act'). The defendants issued the plaintiff a statutory notice of demand ('statutory demand'), pursuant to s. 466 of the Act, where the defendants demanded from the plaintiff the sum of

RM6,579,806.74 essentially for works the defendants claimed were done under progress claim no. 9 of the contract. As a result of the issuance of statutory demand, the plaintiff was compelled to then apply for leave in the RO Suit to commence the proceeding herein. Leave of court was granted. The issues that arose here were as follows: (i) whether winding-up proceedings were subject to or caught by the arbitral proceedings or an arbitration agreement/clause; (ii) whether the arbitral proceeding was the proper forum for the parties' dispute herein to be determined; and (iii) the impact the arbitral proceeding and the parties' arbitration would have on the applicable tests for a *Fortuna* injunction and more specifically, the proper test that should be applied.

Held (allowing originating summons and encl. 8):

(1) Based on *NFC Labuan Shipleasing I Ltd v. Semua Chemical Shipping Sdn Bhd* and other authorities, it was clear that winding-up proceedings are not subject to or caught by an arbitration agreement. Applying this to the instant case would mean that the arbitral proceeding in itself did not prohibit the defendants from presenting and proceeding with a winding-up petition. (para 31)

(2) The proper test to be applied for the grant of a *Fortuna* injunction where there is an arbitration agreement or clause, or otherwise an agreement for parties to refer their dispute to arbitration, is for the applicant to establish a *prima facie* dispute that the debt fell within the arbitration agreement/clause ('lower threshold *prima facie* test'). Simply put, if a petitioner could not succeed on his winding-up petition based on the lower threshold *prima facie* test, how could he then expect to succeed in an application for a *Fortuna* injunction? (paras 36 & 37)

(3) The plaintiff did not merely dispute the defendants' claim under the statutory demand based on the argument that it fell under the arbitration agreement or, in this case, the arbitral proceeding. In fact, the plaintiff went much further to provide detailed reasons for their dispute as well as grounds to support the dispute. This went above and beyond what they needed to show, applying the lower threshold *prima facie* test. The dispute raised by the plaintiff was substantial. There were material issues of fact and law that needed to be determined. It was not difficult for the plaintiff to pass the lower threshold *prima facie* test to establish a *prima facie* case that the dispute fell within the arbitral proceeding given, *inter alia*, that progress claim no. 9 being the subject of the statutory demand was part of Suit 72 for which the stay order was granted. Notwithstanding this, even if the defendants' claim under the statutory demand was said to be undisputed, the plaintiff had a cross-claim or counterclaim of RM85,203,274.96 which far exceeded the sum demanded under the statutory demand. This too was the subject of the arbitral proceeding. (paras 50, 52, 63, 64 & 65)

(4) Whether deliberate or coincidental, having commenced both Suit 72 and the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') payment claim and after failing to proceed with these actions where Suit 72 was stayed due to the stay order and in respect of the CIPAA payment claim, it did not proceed due to some defect in compliance with the applicable procedure of laws, the defendants then decided to issue the statutory demand. The timing of these actions taken by the defendants, Suit 72 and the CIPAA payment claim were in themselves evident that the defendants had considered that there were other processes that could be taken or even needed to be taken to claim the sum under progress claim no. 9. That in itself would affect the suitability of proceeding with a winding-up petition to resolve the matter or rather the defendants' claim. (paras 76-78)

Case(s) referred to:

American Cynamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***
Anglian Sales Ltd v. South Pacific Manufacturing Co Ltd [1984] 2 NZLR 249 ***(refd)***
ASM Development (KL) Sdn Bhd v. Econpile (M) Sdn Bhd [2021] 8 MLJ 99 ***(refd)***
Awangsa Bina Sdn Bhd v. Mayland Avenue Sdn Bhd [2019] 1 LNS 590 HC ***(refd)***
Bakti Dinamik Sdn Bhd v. Bauer (Malaysia) Sdn Bhd (No 2) [2017] 2 CLJ 223 HC ***(refd)***
Bdg v. Bdh [2016] 5 SLR 977 ***(refd)***
Community Development Pty Ltd v. Engwirda Construction Co [1966] 120 CLR 455 ***(refd)***
Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation of the Commonwealth of Australia [1978] VR 83 ***(refd)***
Josu Engineering Construction Sdn Bhd v. TSR Bina Sdn Bhd [2013] 9 CLJ 650 HC ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(refd)***
Lasmos Limited v. Southwest Pacific Bauxite (HK) Limited [2018] HKCFI 426 ***(refd)***
Megasteel Sdn Bhd v. Perwaja Steel Sdn Bhd [2008] 4 CLJ 352 CA ***(refd)***
Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd [2007] 3 CLJ 295 CA ***(refd)***
NFC Labuan Shipleasing I Ltd v. Semua Chemical Shipping Sdn Bhd [2017] 1 LNS 943 HC ***(foll)***
Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd)***
Salford Estates (No 2) Ltd v. Altomart Ltd [2014] EWCA Civ 1575 ***(refd)***
Sime Engineering Sdn Bhd v. RM Leopad Sdn Bhd (No 2) [2005] 5 CLJ 274 HC ***(refd)***
Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd [2007] 2 CLJ 305 CA ***(refd)***
Venus Marine Services Sdn Bhd v. IES Pioneer Ltd [2020] 1 LNS 378 HC ***(refd)***

Legislation referred to:

Arbitration Act 2005, s. 10
Companies Act 2016, ss. 366, 466
Construction Industry Payment and Adjudication Act 2012, s. 5

Arbitration Act 1996 [UK], s. 9

For the plaintiff - Idza Hajar Ahmad Idzam, Lee Shen Yee & Yap Jia Cheng; M/s Zul Rafique & Partners
For the defendants - Ismail Mohamed Arifin & Amirah Nadiah Muhamad; M/s Ram Reza & Muhammad

Reported by Lina E

JUDGMENT

(encls. 1 and 8)

Wan Muhammad Amin Wan Yahya JC:

[1] This was the plaintiff's application by way of originating summons dated 11 March 2021 (encl. 1) to essentially restrain the defendants from presenting a winding-up petition ("this originating summons"). The reliefs sought in this application are, *inter alia*, as follows:

(1) A declaration that the Defendants' demand against the Plaintiff by way of the Statutory Notice issued under Sections 465 and 466 of the Companies Act 2016 dated 23.09.2020 for a claim amounting to RM6,579,806.74 ("Statutory Notice") is null and void;

(2) The Defendants, whether by themselves or by their servants, agents, nominees or otherwise be restrained from acting upon the Statutory Notice including but not limited to filing and/or presenting a winding-up petition against the Plaintiff pursuant to Sections 465 and 466 of the Companies Act 2016 based on the said Statutory Notice.

[2] By way of notice of application dated 15 March 2021 (encl. 8) the plaintiff had also applied for an interim *ex parte* injunction along the terms of prayer 2 of this originating summons pending the disposal of the same.

[3] I granted encl. 8 on an *ex parte* basis and later on an *inter partes ad interim* basis to maintain the *status quo* of the matter while parties filed their respective affidavits and written submissions.

[4] This originating summons and encl. 8 were heard and decided together. I allowed both this originating summons and encl. 8 and I set out below the reasons for my decision.

Salient Background Facts

[5] By way of a letter of award dated 6 April 2016 ("LOA"), the defendants were awarded with the package work for Utilities, Interconnecting, Offsite (UIO) Facilities: Procurement, Construction and Commissioning (PCC) of Underground Pressurised Non-Metallic Piping - Firewater Network East Side (Package 14-0701) by the plaintiff. The defendants were engaged to perform procurement, construction and commissioning of the underground pressurized non-metallic piping underwater network eastside ("package work") and the value of the contract awarded to the defendants as reflected therein is for the sum of RM84,148,028 ("contract price").

[6] The LOA is to be read with, *inter alia*, the following documents:

(i) Part I – form of agreement;

(ii) Part II – special conditions; and

(iii) Part III – conditions of contract and annexures.

(collectively "the contract").

[7] Arising from disputes between parties in relation to the contract, on 13 September 2019 the defendants commenced an action at the Kuala Lumpur High Court, Suit No. WA-22C-72-09-2019 ("suit 72") wherein the defendants claimed for, *inter alia*, the total sum of RM42,696,538.56 which sum includes the amount of RM6,579,806.74 pursuant to progress claim no. 9 of the contract.

[8] Following an application by the plaintiff herein, on 19 June 2020 the High Court in suit 72 granted a stay of further proceedings of suit 72 pending reference of the dispute to arbitration ("stay order").

[9] Apart from suit 72, the plaintiff had issued a notice of arbitration dated 7 November 2019 to the defendants herein claiming for a sum of RM85,203,274.96. The arbitration between the plaintiff and the defendants are still pending ("arbitral proceeding") and in so far as the plaintiff's claims against the first defendant are concerned, it could not be proceeded with due to the restraining order dated 15 February 2021 ("RO") granted by the Kuala Lumpur High Court in suit number WA-24NCC-168-05-2020 ("RO suit"). The RO arises from the first defendant's application for a proposed scheme of arrangement under s. 366 of the Companies Act 2016.

[10] On 23 September 2020, the defendants, through their solicitors, issued a payment claim pursuant to s. 5 of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") ("CIPAA payment claim") where the same sum of RM6,579,806.74 being the alleged payment to be made under progress claim no. 9 was claimed therein along with the alleged payment to be made under progress claim no. 10 under the contract. Based on the plaintiff's supplementary affidavit in encl. 13 and the email dated 7 October 2020 from the international case counsel of the Asian International Arbitration Centre ("AIAC") the registration of the CIPAA payment claim will not be proceeded with unless and until the notice to the Director of the AIAC to register an adjudication (Form 3A) is filed. Based on the documents before the court, no further steps were taken thereafter to continue with the CIPAA payment claim.

[11] On 23 September 2020, the defendants, thorough their solicitors, issued the plaintiff a statutory notice of demand ("statutory demand") pursuant to s. 466 of the Companies Act 2016 where the defendants demanded from the plaintiff the sum of RM6,579,806.74 essentially for works the defendants claim were done under progress claim no. 9 of the contract. The plaintiff had *vide* its solicitors responded to the statutory demand on 5 October 2020, *inter alia*, disputing the demand.

[12] As a result of the issuance of the statutory demand which was received by the plaintiff on 23 September 2020, the plaintiff was compelled to then apply for leave in the RO suit to commence the proceeding herein. Leave of court was granted on 10 February 2021.

Principles Governing A *Fortuna* Injunction

[13] Is trite law that the principles governing an injunction to restraint the presenting of a winding-up petition or "*Fortuna* injunction" is derived from the Australian Supreme Court of Victoria case of *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation of the Commonwealth of Australia* [1978] VR 83. The *Fortuna* injunction is to prevent abuse of process and can be seen from the following passage from *Fortuna Holdings* (*supra*):

> When a court restrains the presentation of a winding up petition to that court it exercises part of its **inherent jurisdiction to prevent abuse of its process.** *Mann v. Goldstein* [1968] 1 WLR 1091, at pp. 1093-4; [1968] 2 All ER 769. (emphasis added)

[14] The principles governing a *Fortuna* injunction in *Fortuna Holdings* (*supra*) was referred to by the Court of Appeal in *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295; [2007] 3 MLJ 316 and was succinctly summarised by the Court of Appeal in *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947 as follows:

> [25] An application for an injunction to restrain an intended winding-up petition against a company is known as a "*Fortuna* Injunction", taking its name from the case of *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation* [1978] VR 83. In that case the court laid down the basis on which a court acts to restrain the presentation of a winding-up petition and the two principles that guide courts in the grant of an injunction to that effect. (see also: *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295 (Court of Appeal).
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> [26] The *first principle* laid down in that case in that an injunction of that nature may be granted by court where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success. *In order to succeed in getting injunction* under this principle, the applicant must satisfy both limbs of the principle ie,
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> (i) *the intended petition has no chance of success, as a matter of law as well as a matter of fact;* and
>
> (ii) the presentation of such petition (which has no chance of success) *might produce irreparable damage to the company.*
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> (see: *Re A Company* [1894] 1 Ch 349; *Charles Forte Investment Ltd v. Amanda* [1964] 1 Ch 240, [1963] 2 All ER 940; and *Bryanston Finance Ltd v. De Vries (No 2)* [1976] 2 WLR 41, [1976] 1 All ER 25).

…

[28] The *second principle* established in the *Fortuna* case is that an injunction of that nature may be granted in cases *where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure.*
(emphasis added)

[15] In *Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd* [2007] 2 CLJ 305; [2007] 4 MLJ 355, the Court of Appeal further held as follows:

[8] When deciding whether to grant an injunction to restrain a petition that is based on a statutory demand for a debt, *the court must be satisfied that the debt is bona fide disputed on substantial grounds* (see *Stonegate Securities Ltd v. Gregory* [1980] 1 All ER 241). It is not enough that there is a serious question to be tried. In other words, this is one of those cases to which *the general test laid down in American Cynamid Co v Ethicon Ltd [1975] AC 396 does not apply.* In *Molop Corp Sdn Bhd v Uniperkasa (M) Sdn Bhd* [2003] 6 MLJ 311, Low Hop Bing J (as he then was) correctly held as follows (at p 321):

> In *Natseven TV Sdn Bhd v. Television New Zealand Ltd* [2001] 4 CLJ 722, I had the occasion to consider and determine the burden of proof cast on the plaintiff in an application for interlocutory injunction to restrain the presentation of a winding up petition, in the following words:
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> > I agree with the reasons given by the English and New Zealand Court of Appeal respectively and by Abdul Malik J and hold that for the purpose of obtaining an interim injunction to restrain the defendant from proceeding with the winding up petition, the burden of proof cast on the plaintiff is only discharged by reference to the standard of proof or test in adducing evidence to establish a *prima facie* case and that *the principle relating to the test of 'serious question to be tried' in American Cynamid Co v. Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504 as applied in Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 is not applicable as the applications there were not applications to restrain winding up petitions or proceedings*, such as in the instant case before me.
> >
> > *Illustration of a prima facie case may be provided by necessary evidence that there is a bona fide dispute by the plaintiff in relation to the statutory demand or that the plaintiff is solvent.*
> > (emphasis added)

[16] At this juncture, I must highlight that learned counsel for the defendants, Mr Ismail bin Mohamed Arifin, had submitted (at paras. 1 and 2 of the defendants' first written submissions (encl. 40)) that this is an injunction application of which the legal principles as laid down in *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ

193 apply and not the hearing of the winding-up petition. Learned counsel for the defendants then referred to the High Court case of *Venus Marine Services Sdn Bhd v. IES Pioneer Ltd* [2020] 1 LNS 378.

[17] With all due respect to learned counsel for the defendants, I am unable to agree with his submissions on this issue and also his reference to *Keet Gerald* (*supra*) *vis-a-vis Venus Marine* (*supra*). I must also point out that *Venus Marine* was not a case involving an application for a *Fortuna* injunction but was in fact a case regarding a winding-up petition. *Venus Marine* (*supra*), as far as I can see, did not deal with the issue of an interlocutory injunction or the principles applicable to it as found in *Keet Gerald* (*supra*). *Venus Marine* (*supra*) referred to the New Zealand case of *Anglian Sales Ltd v. South Pacific Manufacturing Co Ltd* [1984] 2 NZLR 249 and held:

> that a **distinction** should be drawn between the exercise of the discretion on **hearing the petition to wind-up a company** and the exercise of the inherent discretion to **restrain or stay** the presentation of or further proceedings in a petition to wind-up a company. (emphasis added)

[18] Learned counsel for the defendants also raised the issue of damages being an adequate remedy and the balance of convenience test, both of which are tests for an interlocutory injunction.

[19] The legal position on this has been made clear in the Court of Appeal case of *Tan Kok Tong* (*supra*), in that the *American Cynamid Co v. Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504 principle relating to the test of "serious question to be tried" as applied in *Keet Gerald* (*supra*) is not applicable as these cases did not involve an injunction to restrain winding-up petitions or proceedings. I am of the view that the principles of an interlocutory injunction such as whether damages is an adequate remedy and the balance of convenience test are not applicable in so far as the main action being this originating summons is concerned where a permanent *Fortuna* injunction was sought.

[20] Returning to the principles governing a *Fortuna* injunction, in *Josu Engineering Construction Sdn Bhd v. TSR Bina Sdn Bhd* [2013] 9 CLJ 650; [2014] 11 MLJ 916, the High Court considered the issue of a counterclaim or a cross-claim in regards to a debt which was not *bona fide* disputed and in this regard Justice Mary Lim (as she then was, now Federal Court Judge) held as follows:

> [48] When dealing with the standard of proof applicable for determining the existence of *a substantial and bona fide dispute* in winding up proceedings in the following year in the case of *Pacific Recreation Pte Ltd v. SY Technology Inc*, the Court of Appeal referred to *Metalform Asia* and reiterated its stand that *'the courts should not be quick to condemn viable companies which have plausible responses to claims made against them'.*

> [49] From the above cases, it can first of all be said that where a debt is undisputed, an injunction to restrain the presentation of a petition to wind up a company upon failure to pay upon the debt demanded is generally refused. The arguments challenging the issuance of the s. 218 notice should also be made in the winding up court. Otherwise, the only viable option is to pay up. Secondly, *where a debt is undisputed, an injunction may nevertheless be ordered where a genuine cross-claim based on substantial grounds is raised.* In such a case, the *courts recognise that the presentation of such a petition might produce irreparable damage to business and reputation.* Thirdly, the *burden of proof in both instance* of disputed debt and undisputed debt is *whether there is a likelihood that the petition to wind up may fail or that it is unlikely that a winding up order would be made; as opposed to a test that the petition is bound to fail.* (emphasis added)

[21] Therefore, I agree with submissions of learned counsel for the plaintiff, Ms Idza Hajar binti Ahmad Idzam, that based on *Josu* (*supra*) in both circumstances where the debt is disputed and undisputed the test is "a likelihood that the petition to wind up may fail or that it is unlikely that a winding up order would be made", and not whether or not the petition is "bound to fail".

[22] To summarise the principles applicable for the grant of a *Fortuna* injunction, the court must consider:

(i) whether there is a *bona fide* and substantial dispute as to debt;

(ii) whether the said dispute as to the debt is such that it would affect the likelihood or chances of success of the intended winding-up petition;

(iii) whether the presentation of a winding-up petition would cause irreparable damage to the company; and

(iv) where the debt is undisputed, whether there is a genuine crossclaim based on substantial grounds and in this regard the burden of proof in both instances of a disputed debt and undisputed debt is whether there is a likelihood that the petition to wind up may fail or that it is unlikely that a winding-up order would be made.

Whether Winding-Up Proceedings Are Subject To The Arbitral Proceeding

[23] Whilst this issue on whether the intended winding-up proceedings are subject to or caught by the arbitral proceeding was submitted as the last issue raised by learned counsel for the defendants, however, I am of the view that this issue ought to be dealt with first as it has bearing on the other issues regarding the requirements for a *Fortuna* injunction.

[24] The issue here is whether the arbitral proceeding has an impact on the general principles that govern a *Fortuna* injunction. This is because parties have agreed contractually for their dispute to be determined *via* arbitration. Therefore, this raises the question as to whether the defendants are entitled

and, for that matter, right to initiate winding-up proceedings against the plaintiff given that parties had agreed to an alternative procedure to resolve their dispute, that is *via* arbitration. This is also connected to the proper forum issue.

[25] Thus, to summarise, the issues here are as follows:

(i) whether winding-up proceedings are subject to or caught by the arbitral proceeding or an arbitration agreement/clause;

(ii) in this regard whether the arbitral proceeding is the proper forum for the parties' dispute herein to be determined; and

(iii) the impact the arbitral proceeding and parties' arbitration agreement will have on the applicable tests for a *Fortuna* injunction and more specifically the proper test that should be applied.

[26] The above three issues are interconnected and will be dealt with together.

(i) Winding-Up Proceedings Are Sui Generis

[27] The issue of whether a winding-up petition is subject to an arbitration agreement was considered in *NFC Labuan Shipleasing I Ltd v. Semua Chemical Shipping Sdn Bhd* [2017] 1 LNS 943. In this case the respondent had applied for a stay of winding-up proceedings pending reference to arbitration pursuant to s. 10 of the Arbitration Act 2005 as well as an application to strike out the winding-up petition. In refusing the stay application the learned High Court Judge, Justice Mohd Nazlan Mohd Ghazali, in addition to what parties there had submitted went on in holding that a winding-up petition is *sui generis* and held as follows:

> [32] For completeness, even if the above analysis of mine is incorrect, an additional if not alternative explanation, advanced by neither the petitioner nor the respondent, as to why, in my view, this stay application filed by the respondent cannot succeed is the more fundamental objection premised on the very nature of a winding-up process itself. *Winding-up proceeding is plainly a class of its own. It is sui generis. It is primarily regulated by the provisions of the law enacted specifically to govern such proceedings.*
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> [33] The English Court of Appeal in *Ridgeway Motors (Isleworth) Ltd v. ALTS Ltd* [2005] 1 WLR 2871 in the judgment of Mummery LJ held that *a winding-up petition was sui generis, was not a form of execution of the judgment on which the petition was based,* and thus in that case, did not fall within the definition of "action" in s. 38(1) of the UK Limitation Act 1980; and accordingly the petition was not statute-barred.
>
> [34] It bears repetition that *the petition is sui generis as winding-up proceedings feature a distinct characteristic of a wider legal process.* Even though it may be initiated by a single petitioning creditor, upon the granting of the order for winding-up, the process which enables what may be regarded as the

collective enforcement of proven debts of the company will be activated, for the benefit of not just the petitioner but instead the general body of unsecured creditors, all on *pari passu* basis. It must be recognised that a winding-up petition is not a claim for payment. It is, instead, what may be regarded as a class action in the public interest which brings into operation the statutory regime for realising and distributing the assets of a company for the benefit of its creditors. *This is manifestly not the objective of having the alleged dispute referred to arbitration. The reliefs are certainly not the same and the end results, of a successful civil dispute subject to arbitration and a winding-up petition, if granted, could not be more different and are miles apart.*

[35] *A stay application of a winding-up petition pending arbitration could thus be viewed to be of doubtful relevance and validity.* A winding-up petition is not in the nature of a substantive claim before the Court that is contemplated by Section 10 of the AA. Section 10 talks about a matter in a substantive claim, as stated in its heading. But a winding-up process is essentially a proceeding to wind up for the inability to pay debt, as was alleged in this instant case. The respondent, in response, need only to show the debt to be disputed and to rebut presumption of insolvency. The affidavit in opposition is designed to help a debtor to achieve this.

[36] This is the legal position that obtains in this country. This is made manifest in various authorities. I only need to refer to the judgment of Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248 where the *sui generis* character of a winding-up is expressed in the following terms:

> *But a petition for winding-up is not execution. For a winding-up petition is not based upon any judgment of a court.* Normally, it is based on the inability of a company to pay its debts as and when they fall due. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s. 218 of the Companies Act. But the issuance of such a notice is not a *sine qua non* for the presentation of a winding up petition. What is needed is compelling evidence of the company's inability to pay its debts as and when they fall due. (emphasis added)

[28] The High Court in *NFC Labuan* (*supra*) further held that the reliefs and outcomes of a winding-up petition are different and this can be seen from the following passages:

[46] *Fundamentally, a petition is premised on the inability of the debtor to pay the debt of the creditor. It is not to determine whether the respondent in the instant case is legally indebted to the petitioner herein.* In as much as a winding-up petition is not dependent on any judgment, is not an execution, nor an action subject to limitation statute (at least not in the UK), a stay of the same by referring the petition to arbitration is entirely incongruent with the true essence of a winding-up petition.

…

A [49] *As such, a winding-up petition is not a 'proceeding' that is susceptible to a stay pending arbitration under Section 10 of the AA. Equally significantly, neither does the petition concern a "matter" that is subject to an arbitration agreement.* The petition merely raises the claim of an inability to pay a debt set out in the statutory demand. *That is strictly not an issue which is subject to the arbitration clause, which as mentioned above, in clause 55(ix) requires any dispute arising from*
B *the Bareboat Charters shall be referred to arbitration in Singapore.* The respondent argued that there is a dispute on the alleged breach on its part of the Bareboat Charters as well as on the purported non-payment of hire by the respondent.

[50] But these are quite different from the question on the overarching
C issue of the inability of the respondent to pay the debt. *The winding-up petition does not and cannot seek to achieve an objective – which is the determination of a dispute – which could otherwise be resolved in the arbitration forum.* Thus, in my view as a general rule, winding-up proceedings are not within the contemplated remit of Section 10 of the AA. In other words, a stay under Section 10 of the AA would be patently inappropriate and conceptually
D incongruent within the winding-up context. (emphasis added)

[29] The Australian case of *Community Development Pty Ltd v. Engwirda Construction Co* [1966] 120 CLR 455 was referred to in *NFC Labuan* (*supra*) where it was held that the High Court of Australia ruled that winding-up proceedings did not fall within the scope of the arbitration clause.

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[30] The High Court in *NFC Labuan* (*supra*) also referred to the English Court of Appeal case of *Salford Estates (No. 2) Ltd v. Altomart Ltd* [2014] EWCA Civ 1575 and held as follows:

[55] The other is the decision of the English Court of Appeal in *Salford*
F *Estates (No. 2) Ltd v. Altomart Ltd* [2014] EWCA Civ 1575, where the key question was not unlike presently, *whether a winding-up petition was capable of being stayed pursuant to Section 9 of the UK Arbitration Act 1996,* in situations where the petition debt arose pursuant to an under-lease that contained an *arbitration clause.*

G [56] The Court of Appeal disagreed with the decision of the High Court, and held that an issue on a winding-up petition concerning a disputed debt did not become a claim falling within the said Section 9 of the UK Arbitration Act 1996. As such, *the Court is not bound by the Arbitration Act to stay the winding-up petition.*

H …

[58] Thus, nevertheless, given that the Court's power to make a winding-up order is discretionary, the English Court of Appeal further decided that the Court will exercise its discretion under Section 122(1) of the Insolvency Act 1986 to *decline to wind up a company where the debt upon which the petition is based is subject to an arbitration agreement and that debt is not*
I *admitted. This would be the position even where the Court takes the view that the debt is not bona fide disputed on substantial grounds.* Thus the petition should be dismissed (rather than stayed) unless there is evidence that there is another creditor willing to be substituted as a petitioning creditor.

> [59] Such a position is not contrary to the analysis of this Court that has found that Section 10 of the AA has no application to winding-up proceedings. Even *recognizing the potential process abuse by parties filing winding-up petitions to exert unfair pressure instead of litigating the dispute in adherence to an arbitration agreement, and in view of the need to give due regard to the clear legislative intent of arbitration statutes, there is no impediment to the winding-up court to proceed to hear the petition and decide to dismiss the same, or even in exceptional circumstances as highlighted earlier in this judgment, stay the proceedings, as the justice of the case may demand.* But this does not in any valid manner equate to the proposition that the law sanctions an automatic and mandatory stay of winding-up petition for reference to arbitration under Section 10 of the AA, in terms contemplated by enclosure 18 herein.
>
> (emphasis added)

[31] Therefore, based on *NFC Labuan* (*supra*) and the cases cited therein it is clear that a winding-up proceedings are not subject to or caught by an arbitration agreement. Applying this to the instant case would mean that the arbitral proceeding in itself does not prohibit the defendants from presenting and proceeding with a winding-up petition.

(ii) The Lower Threshold Prima Facie Test

[32] However, the issue does not end there as it raises the next question as to how the arbitral proceeding (including an arbitration agreement), if at all, would affect the requirements for a *Fortuna* injunction. The answer to this question can be found from the following passages in the case of *Awangsa Bina Sdn Bhd v. Mayland Avenue Sdn Bhd* [2019] 1 LNS 590 where Justice Wong Chee Lin (as she then was) considered the decision in *NFC Labuan* (*supra*) as well as *Salford Estates* (*supra*):

> [12] *I am inclined to agree with the decision in NFC Labuan that Section 10 of the Arbitration Act does not apply to winding up petitions.* This view is also in line with the decision of the UK Court of Appeal in *Salford Estates (No 2) Ltd v. Altomart Ltd (No 2)* [2015] Ch 589 referred to in *NFC Labuan* wherein the Court of Appeal held that a winding up petition based on the particular debt specified in the petition was not a "claim" for payment of that debt, since it was not certain that any winding up order which might follow would result in the right to payment of an amount equal to the debt specified; and that, therefore, where a winding up petition was based on a company's inability to pay its debts and what was in dispute was the existence of a particular debt, section 9(1)(4) of the UK Arbitration Act 1996 (which is similar to section 10(1) of our Arbitration Act) *did not remove the court's jurisdiction and discretionary power to wind up a company deemed unable to pay its debts.*
>
> [13] *However, the Court of Appeal went on to say* as follows:
>
> > [39] My conclusion that the mandatory stay provisions in section 9 of the 1996 Act do not apply in the present case is not, however, the end of the matter. Section 122(1) of the 1986 Act confers on

A the court a discretionary power to wind up a company. *It is entirely appropriate that the court should, save in wholly exceptional circumstances which I presently find difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 Act.* This was the alternative analysis of Sarren J in the *Rusant* case at para 19.

B [40] Henry and Swinton Thomas LJJ considered in *Jalki Shipping Copn v. Spoex Oils Ltd* [1998] 1 WLR 726 that the intention of the legislature in enacting the 1996 Act was to exclude the court's jurisdiction to give summary judgment, which had not previously been excluded under the Arbitration Act 1975. *It would be anomalous, in the circumstances, for the Companies' Court to conduct a summary*
C *judgment type analysis of liability for an unadmitted debt, on which a winding up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration.* Exercise of the discretion otherwise than consistently with the policy underlying the 1996 Act *would inevitably encourage parties to an arbitration agreement - as a standard tactic - to bypass the arbitration agreement and the 1996 Act by*
D *presenting a winding up petition.* The way would be left open to one party, through the draconian threat of liquidation, *to apply pressure on the alleged debtor to pay up immediately or face the burden, often at short notice on an application to restrain presentation or advertisement of a winding up petition,* of satisfying the Companies Court that the debt is *bona fide* disputed on substantial grounds. That would be entirely
E contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 Act.

[41] There is no doubt that *the debt mentioned in the Petition falls within the very wide terms of the arbitration clause* in the Lease. *The debt is not*
F *admitted.* In accordance with the decision in the *Halki Shipping* case, *that is sufficient to constitute a dispute within the 1996 Act,* irrespective of the substantive merits of any defence, and were there proceedings on foot to recover the debt, to trigger the automatic stay provision in section 9(1) of the 1996 Act. For the reasons I have given, I consider that, as a matter of the exercise of the court's discretion
G under section 122(l)(f) of the 1986 Act, *it was right for the court either to dismiss or to stay the Petition so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt is bona fide disputed on substantial grounds.*

H [14] Section 122(1) of the Insolvency Act 1986 in UK states that : "A company may be wound up by the court if ... (f) the company is unable to pay its debts ... (g) the court is of the opinion that it is just and equitable that the company should be wound up. (emphasis added)

[33] In determining the proper test to be applied on what constitutes a *bona*
I *fide* disputed debt, the High Court in *Awangsa* (*supra*) referred to the Singapore case of *Bdg v. Bdh* [2016] 5 SLR 977 which in turn referred to *Salford Estates* (*supra*) and held as follows:

[15] In the case of *Bdg v. Bdh* [2016] 5 SLR 977, the plaintiff entered into two contracts with the defendant for the supply of drilling units for fossil fuel production off Nigeria. The contracts included a tiered dispute resolution clause, which specified that discussions were to be held between representatives, and eventually the top management, of each company. If these dispute resolution mechanisms did not work out, the parties were to refer the dispute to arbitration.

[16] As things turned out, a number of invoices from the defendant were not paid by the plaintiff. Discussions were held between the two sides. The defendant said that ultimately nothing was agreed but the plaintiff contended that there was a settlement agreement reached.

[17] In June 2016, a statutory demand was issued by the defendant to the plaintiff. *The plaintiff filed an application to restrain the commencement of winding up proceedings, arguing that there was a dispute between them that was governed by an arbitration clause.* The plaintiff contended that an injunction could be granted to restrain the commencement of winding up if a debt was *bona fide* disputed. Although the usual standard was that triable issues had to be raised, where there was an arbitration agreement governing the dispute, the applicable standard was that in *Salford Estates (No 2) v. Altomart Ltd (No 2)* [2015] Ch 589, ie, whether *prima facie* there was a dispute which was subject to an arbitration clause. If so, the dispute was governed by that clause. The defendant argued that there was no *bona fide* dispute. Further, the *prima facie* test in *Salford Estates* was too low a standard and the requirement that a triable issue be raised should be retained.

[18] *The High Court granted the plaintiff an injunction to restrain the filing of the winding up application* and held as follows:

a) A dispute existed whenever a claim by one side was asserted to be disputed or denied by the other;

b) The general approach to determine the existence of a *bona fide* dispute was whether a triable issue had been made out. The court was required to examine the affidavit evidence, and consider whether on such material, an arguable case could be made, meriting the holding of a trial of the issues. That standard would require more inquiry and assessment than a standard requiring only making out that a dispute existed *prima facie*;

c) However, where a dispute between the parties was subject to an arbitration clause, the test was that in *Salford Estates*, ie, whether there was a *prima facie* dispute. The objective of the triable issue standard was to ensure that winding up was not staved off on tenuous grounds. *However, this objective was less pressing when there was an arbitration clause. Instead, parties should be held to their agreement that disputes were to be arbitrated. Any weakness of a case should be a matter for the arbitrators, rather than the court, to decide. In addition, in these situations, the parties were essentially in dispute about the existence of a dispute.* Trying

to ascertain a triable issue in this context would be likely to be an exercise that would not be fruitful, efficient or proportionate, without any countervailing benefit;

d) *The adoption of the lower standard in Salford Estates would not stymie the winding up regime by opening the door to gaming of the system by companies desperate to fend off creditors.* First, if the issues raised were not *bona fide*, this would be a reason to find that there was no dispute *prima facie*. *Second, since arbitration would have been contemplated from the time the parties entered into an agreement, there would be nothing inequitable in asking the parties to go through arbitration before they invoked the winding up process;*

e) In this case, a dispute existed *prima facie*, as the plaintiff asserted that there was a binding settlement, but the defendant denied that there was such a settlement;

f) The plaintiff showed that they were in *prima facie* compliance with the requirements of the tiered dispute resolution clause. *A stricter standard should not be applied as this would be incongruent with the standard applicable to stays in favour of arbitration;* and

g) *The plaintiff only needed to establish a prima facie case that the dispute regarding the putative settlement agreement fell within the arbitration clause which they did in this case.* Other than that, the scope of the arbitration clause would be a matter for the arbitrator to decide on.

(emphasis added)

[34] *Salford Estates* (*supra*) and *Bdg v. Bdh* (*supra*) were also considered in the Hong Kong Court of First Instance case of *Lasmos Limited v. Southwest Pacific Bauxite (HK) Limited* [2018] HKCFI 426. Justice Wong Chee Lin in *Awangsa* (*supra*) nicely summarised the position taken in *Lasmos* (*supra*) by the Hong Kong Court of First Instance as follows:

> [19] The above cases were considered by the Hong Kong Court of First Instance ("CFI") in *Lasmos Limited v. Southwest Pacific Bauxite (HK) Limited* [2018] HKCFI 426 where the CFI held that *a winding up petition issued on the ground of insolvency should generally be dismissed if there is an arbitration clause contained in an agreement giving rise to a debt relied on to support the petition:*
>
> …
>
> [23] Based on the foregoing, the CFI decided to depart from the previous approach in Hong Kong and held that a winding up petition should generally be dismissed if *(a) a company disputes the debt relied on by the winding up petitioner; (b) the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and (c) the company takes steps required under the arbitration clause to commence the contractually mandated dispute resolution process* and files an affirmation in accordance with Rule 32 of the Companies (Winding Up) Rules (Cap 32H) demonstrating this. (emphasis added)

[35] In applying the decisions of *Salford Estates* (*supra*), *Bdg v. Bdh* (*supra*) and *Lasmos* (*supra*), Justice Wong Chee Lin in *Awangsa* (*supra*) dismissed the winding-up petition and concluded as follows:

> [28] However, *applying the lower threshold of merely showing a prima facie dispute, since the debt here is the subject matter of an arbitration clause,* I am of the view that the Respondent has discharged the burden of showing a *prima facie* dispute, bearing in mind that *a denial of the indebtedness constitutes a dispute. The merits or otherwise of the dispute are matters to be decided by the arbitrator and not by this Court and the Respondent had given notice of arbitration to the Petitioner.* Accordingly, I would not stay the winding up petition pending arbitration under section 10 of the Arbitration Act 2005 but, in the exercise of my discretion under section 465 of the Companies Act 2016, I would dismiss the winding up petition on the ground that the Respondent has shown the existence of a *prima facie* dispute which ought to be referred to arbitration. (emphasis added)

[36] I am of the considered view that based on *Salford Estates* (*supra*), *Bdg v. Bdh* (*supra*) and *Lasmos* (*supra*) which were applied in *Awangsa* (*supra*), the proper test to be applied for the grant of a *Fortuna* injunction where there is an arbitration agreement or clause (or otherwise an agreement for parties to refer their dispute to arbitration) is for the applicant to establish a *prima facie* dispute that the debt fell within the arbitration agreement/clause ("the lower threshold *prima facie* test").

[37] It is axiomatic that if the cases such as *Salford Estates* (*supra*), *Lasmos* (*supra*) and *Awangsa* (*supra*) which involved winding-up petitions had applied the lower threshold *prima facie* test in deciding whether to stay or dismiss the petition where there is an arbitration agreement, I do not see why this same test should not also apply to an application where a *Fortuna* injunction is sought.

[38] Simply put, if a petitioner cannot succeed on his winding-up petition based on the lower threshold *prima facie* test, how can he then expect to succeed in an application for a *Fortuna* injunction.

[39] The case of *Bdg v. Bdh* (*supra*) is a case directly on point where an injunction to restrain the winding-up petition was allowed based on the lower threshold *prima facie* test.

[40] I did not arrive at this conclusion lightly and note that the application of this lower threshold test was considered and adopted in no less than three other jurisdictions that is the United Kingdom (*Salford Estates* (*supra*)), Hong Kong (*Lasmos* (*supra*)) and Singapore (*Bdg v. Bdh* (*supra*)).

[41] In this regard, I find it apt and worth repeating the following passages from *Salford Estates* (*supra*):

A It would be anomalous, in the circumstances, for the Companies' Court to conduct a summary judgment type analysis of liability for an *unadmitted debt,* on which a winding up petition is grounded, *when the creditor has agreed to refer any dispute relating to the debt to arbitration. Exercise of the discretion otherwise than consistently with the policy underlying the 1996 Act would inevitably encourage parties to an arbitration agreement - as a standard tactic - to bypass the* B *arbitration agreement and the 1996 Act by presenting a winding up petition.* The way would be left open to one party, through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay up immediately or face the burden, *often at short notice on an application to restrain presentation or advertisement of a winding up petition,* of satisfying the Companies Court C *that the debt is bona fide disputed on substantial grounds.* That would be *entirely contrary to the parties' agreement as to the proper forum for the resolution* of such an issue and to the legislative policy of the 1996 Act. (emphasis added)

[42] Thus, I am of the considered view that it is only proper for the lower threshold *prima facie* test to be applied in this originating summons where there is an arbitration agreement and more so the arbitral proceeding which D is already afoot.

[43] This is bearing in mind that the original standard requirement that the "the court must be satisfied that the debt is *bona fide* disputed on substantial grounds" in deciding whether to grant an injunction to restrain a winding-up E petition has already been established (*Tan Kok Tong* (*supra*)) and therefore there is no reason why the lower threshold *prima facie* test mentioned above should not apply where there is an arbitration agreement.

[44] I now turn to the arguments raised by learned counsel for the defendants and learned counsel for the plaintiff on this issue which I found F to be moving in several directions when there are only three sub-issues involved as stated in para. 25 above.

[45] However, for the purpose of completeness and clarity I will address the arguments of both learned counsels for the defendants and the plaintiff on this issue which, to my mind, ultimately revolve around the sole question G of whether winding-up proceedings are subject to an arbitration agreement/ clause. Their arguments covered several aspects of the question at hand and include the following three issues:

(i) the issue of a stay under s. 10 of the Arbitration Act 2005;

H (ii) the effect of the stay order and the arbitral proceeding on winding-up proceedings; and

(iii) the issue of whether the defendants' claim under its statutory demand is a non-arbitrable matter as:

I (a) it is a subject matter of the winding-up proceedings; and

(b) it is not a subject of the arbitral proceeding which is premised upon the plaintiff's counterclaim and not progress claim no. 9.

[46] Interestingly, the earlier cited cases of *NFC Labuan* (*supra*) and *Awangsa* (*supra*) were relied on by learned counsel for the defendants to support his argument on the above three issues. However, with due respect to learned counsel for the defendants, both these cases only support his arguments in so far as winding-up proceedings are not subject to the arbitral proceeding or an arbitration agreement/clause.

[47] As I have laid out the relevant applicable principles of law earlier in this judgment, the answers to the above three issues can be summarised as follows:

(i) The cases such as *NFC Labuan* (*supra*) and *Awangsa* (*supra*) dealt with a stay of winding-up proceedings pending reference to arbitration pursuant to s. 10 of the Arbitration Act 2005. This includes *Salford Estates* (*supra*) which is based on a similar provision under s. 9 of the United Kingdom Arbitration Act 1996. Based on the decisions of, *inter alia*, these cases, I am of the view that a stay under s. 10 of the Arbitration Act 2005, the stay order obtained in suit 72 and the arbitral proceeding would not prohibit the defendants from initiating winding-up proceedings as they do not apply to winding-up proceedings. Winding-up proceedings are *sui generis*. This answers the issues in para. 45(i) and (ii) above.

(ii) Regarding issues in para. 45(iii)(a) and (b), again applying the principles laid down in *NFC Labuan* (*supra*), *Awangsa* (*supra*) and *Salford Estates* (*supra*), I answer these issues raised by learned counsel for the defendants, in the following manner:

(a) Just because the defendants' claim under the statutory demand falls under winding-up proceedings does not mean that it cannot be determined or is prohibited from being determined by way of arbitration. As clearly held in *NFC Labuan* (*supra*) a winding-up petition and arbitration are different. The reliefs and outcomes are different, the questions to be determined are different and the considerations are different. Thus, both winding-up proceedings and arbitration can technically co-exist in that they can both proceed parallel with each other. However, I would not consider it desirable to do so. They may be considered separate and different proceedings but when they involve the same subject matter or claim, they may cause "multiplicity" though not within the strict legal meaning of the word. Be that as it may, the answer to issue (iii)(a) is that the claim under the statutory demand can also be the subject matter of an arbitration proceeding.

(b) On issue (iii)(b), it was argued on behalf of the defendants that the notice of arbitration (the arbitral proceeding) is only in respect of the defendants' counterclaim. However, I am unable to agree with this

argument as the progress claim no. 9 was a specific part of the defendants' claim in suit 72 for which the stay order (pending reference of the dispute to arbitration) was granted. It was also argued that the notice of arbitration only contained the plaintiff's counterclaim but it is far too early in the initial stage of the arbitral proceeding to determine whether or not it is confined only to the plaintiff's counterclaim/cross-claim. In any event, it would not make any difference in view of the answer I have given in para. 47(ii)(a) above.

[48] In summary, the defendants' are not prohibited from initiating winding-up proceedings on account of the arbitral proceeding alone and what now needs to be considered is whether the debt is *prima facie* disputed based on the lower threshold *prima facie* test as well as the other considerations for the grant of a *Fortuna* injunction.

Whether The Debt Is *Prima Facie* Disputed

[49] Having determined the proper test to be applied I will now address the issue of whether the debt is *prima facie* disputed.

[50] Unlike the facts of *Awangsa* (*supra*), the plaintiff in the present case did not only merely dispute the defendants' claim under the statutory demand based on the argument that it falls under the arbitration agreement or in this case the arbitral proceeding. In fact, the plaintiff went much further to provide detailed reasons for their dispute as well as grounds to support the dispute.

[51] This, to my mind, is going above and beyond what they need to show applying the lower threshold *prima facie* test (*Bdg v. Bdh* (*supra*); *Salford Estates* (*supra*); and *Awangsa* (*supra*)).

[52] The defendants' statutory demand is based on progress claim no. 9 and is premised on the argument that it is undisputed for the following reasons:

(i) the sum RM6,579,806.74 under progress claim no. 9 has been certified;

(ii) the "certificates" reflect the sum due to the defendants since 2017;

(iii) the defendant's statutory demand is supported by the following documents relied on by the defendants:

(a) letter of award dated 6 April 2016;

(b) the defendants' proforma invoice dated 11 November 2017; and

(c) work progress certificate signed by various persons stated therein in November 2017 ("work progress certificate").

(iv) the process of payments under the contract and as previously practiced were followed in particular in respect of progress claims no. 7 and no. 8 which have been paid.

(v) the plaintiff's corporate background as a wholly-owned company of Petronas Refinery and Petrochemical Corporation and is part of Petronas.

[53] In response to these arguments, the plaintiff raised the following:

(i) Contrary to the allegation that the work progress certificate enclosed in the statutory demand was issued by the plaintiff, the said certificate was actually prepared and submitted by the consortium (which consists of the first and second defendants) as fulfilment of one of the requirements for a valid payment claim as required in the contract. The said work progress certificate differs from an approved payment certificate which would have been issued by the plaintiff after having reviewed a payment claim and certifying money due for payment by the plaintiff. Hence, there is never any undisputed debt and/or that there had been any acknowledgement of such undisputed fact by the plaintiff.

(ii) The claim by the defendants for payment in relation to progress claim no. 9 had repeatedly disputed by the plaintiff. Reference was made to, *inter alia*, the plaintiff's solicitors' letter dated 2 October 2019 regarding disputes arising from the contract including the claim on progress claim no. 9.

(iii) Pursuant to art. 32.8 of the contract (the letter of award) read with, *inter alia*, the conditions of contract), the conditions for payment would first need to be fulfilled before any payment(s) being deemed to be due and payable by the plaintiff herein under the terms of the contract. At all material times, the documents which ought to be issued and be in place prior to progress claim no. 9 being deemed due and owing as per art. 32.8 of the contract has not been fulfilled by the defendants. The proforma invoice enclosed to the statutory notice is merely a proforma invoice rather than an actual invoice issued by the defendants after the plaintiff's issuance of a payment certificate.

(iv) Further, the defendants' allegation that their submission for progress claim no. 9 is similar to what they have done for progress claims no. 7 and no. 8 is also devoid of merits and of no basis. This can be clearly seen by a simple perusal of the documents which have been submitted for progress claims no. 7 and no. 8 and the documents which have been submitted for progress claim no. 9. The documents such as tax invoice, certificate of acceptance form and work progress certificate are clearly missing and have not been submitted for payment claim no. 9. Reference was made to the documents submitted for progress claims no. 7 and no. 8.

(v) Hence, the plaintiff has no obligation to make any payment(s) for progress claim no. 9 as the requirements/procedure under art. 32.8 of the contract has not been fulfilled by the defendants and the sum claimed are disputed.

[54] Article 32.8 of the contract states as follows:

32.8 OWNER is **not obliged to approve and issue a payment certificate or make a payment** of the CONTRACT PRICE, and PACKAGE CONTRACTOR shall have no entitlement to any payment or further payments of the CONTRACT PRICE, unless and until the following conditions are satisfied:

(a) PACKAGE CONTRACTOR has complied with its obligations under ARTICLE 3;

(b) PACKAGE CONTRACTOR has delivered, and maintained or replaced (as applicable) the PERFORMANCE SECURITY in accordance with ARTICLE 5;

(c) PACKAGE CONTRACTOR has procured and maintained the insurance policies required by and in accordance with ARTICLE 45;

(d) in respect of a **payment claim,** PACKAGE CONTRACTOR has submitted a valid **payment claim** complying with the requirements of **ARTICLE 32.3; and**

(e) **following OWNER'S issuance or approval of a payment certificate,** PACKAGE CONTRACTOR supplies to OWNER an invoice for the amount payable under the payment certificate:

(i) in a form which must be approved by OWNER (acting reasonably and without withholding or delaying approval);

(ii) complies with ARTICLE 21.3(a)(ii);

(iii) which, in accordance with applicable LAW and as directed by OWNER separately itemises goods and services and contains the statement "SUPPLY OF GOODS" where the invoice claims payment for any EQUIPMENT and MATERIALS or PACKAGE CONTRACTOR'S EQUIPMENT (or both); and

(iv) which, if the payment certificate is one referred to in ARTICLE 32.5(a)(i), must be issued by the entity referred to in ARTICLE 7.3 01 the Malaysian office of another member of the Consortium incorporated in Malaysia. (emphasis added)

[55] Article 32.3 of the contract states as follows:

32.3 Each payment claim submitted by PACKAGE CONTRACTOR must be:

(a) in the form approved, by OWNER; and

(b) accompanied by:

(i) the statutory declaration referred to in ARTICLE 11.4(b);

(ii) a "work progress certificate" (in a form approved by OWNER) signed by PACKAGE CONTRACTOR or PACKAGE CONTRACTOR'S REPRESENTATIVE to certify the progress

> of the PACKAGE WORK achieved (and otherwise in accordance with the OWNER'S REQUIREMENTS); and information, records and documentation to verify and substantiate the payment claim.

[56] I find merits in learned counsel for the plaintiff's submissions. The defendants' main contention is that the progress claim no. 9 has been certified and the documents required had been submitted but that does not appear to be the case here. Even the word "certificates" used by the defendants' learned counsel in his written submissions is confusing to say the least.

[57] It is evident that the supporting documents that is required to be submitted before a payment certificate or payment can be made is governed by art. 32.8 which needs to be read together with various other terms of the contract including art. 32.3. The requirements of art. 32.8 themselves are quite onerous and do not seem to have been complied with based on the documents submitted by the defendants.

[58] The other main issue is regarding the defendants' contention that the plaintiff had certified the work under progress claim no. 9 based on the work progress certificate but this certificate, on the face of it, does not appear to be issued by the plaintiff. In the previous progress claims no. 7 and no. 8, there is also a document entitled "certificate of acceptance form" issued by the plaintiff which is not found in the documents in support of progress claim no. 9.

[59] Similarly, in both progress claims no. 7 and no. 8 the defendants had submitted a "tax invoice" as opposed to the "proforma invoice" which was submitted by the defendants in respect of progress claim no. 9.

[60] Thus, the debt for which the statutory demand is disputed by the plaintiff at several levels, both *prima facie* and substantial.

[61] Applying the lower threshold *prima facie* test based on *Bdg v. Bdh* (*supra*) and *Awangsa* (*supra*), all that the plaintiff needed to show was, as stated in *Bdg v. Bdh* (*supra*):

> Again, all that the Plaintiff needs to establish is **a *prima facie* case that the dispute falls within the agreement**: *Tomolugen* at [65]. Other than that, the scope of the arbitration clause would be a matter for the arbitrator to decide on: *Doshion* ([10] supra) at [4]. (emphasis added)

[62] I reiterate that the issues raised by the plaintiff are not merely that the dispute fell within the arbitral proceedings under the lower threshold *prima facie* test but they also pass the usual standard requirement for a *Fortuna* injunction based of *Tan Kok Tong* (*supra*) that the debt is *bona fide* disputed on substantial grounds.

[63] Naturally, if the dispute is not *bona fide*, there would be no *prima facie* dispute (*Bdg v. Bdh* (*supra*)) but what must be stressed here is that the dispute raised by the plaintiff is substantial. There are material issues of fact and law that needs to be determined.

[64] Hence, it is not difficult for the plaintiff to pass the lower threshold *prima facie* test to establish a *prima facie* case that the dispute falls within the arbitral proceeding given, *inter alia*, that progress claim no. 9 being the subject of the statutory demand was part of suit 72 for which the stay order was granted.

[65] Notwithstanding this, even if the defendants' claim under the statutory demand is said to be undisputed, the plaintiff has a cross-claim or counterclaim of RM85,203,274.96 which far exceeds the sum demanded under the statutory demand. This too is the subject of the arbitral proceeding.

[66] The plaintiff contends that it had descoped and engaged third parties since August 2017 to complete the package work and that ultimately, by way of letter dated 3 April 2018, the consortium had agreed to the discontinuance of all the remaining works with immediate effect. This then gave rise to the plaintiff's cross-claim against the defendants.

[67] In this regard, Justice Darryl Goon (as he then was, now Court of Appeal Judge) held in *ASM Development (KL) Sdn Bhd v. Econpile (M) Sdn Bhd* [2021] 8 MLJ 99 as follows:

> [35] Within the 'second branch of the principle', McGarvie J identified two possible situations when an injunction might issue to restrain the presentation of a winding up petition. The first is where the petition is to be based on a debt that is genuinely disputed on substantial grounds (see also for example *Mann and Another v. Goldstein and Anor* [1968] 2 All ER 769). The second is where the existence of the **creditor's debt may not be disputed, but the company 'genuinely claims on substantial grounds to have a cross-claim equal to or exceeding the petitioner's debt'.**
>
> (emphasis added)

[68] This issue of a genuine cross-claim has also been stated earlier in *Josu* (*supra*) (see also *Bakti Dinamik Sdn Bhd v. Bauer (Malaysia) Sdn Bhd (No 2)* [2017] 2 CLJ 223; [2016] MLJU 916 which dealt with a cross-claim in respect of a *Fortuna* injunction).

[69] This is one of reasons I find the debt claimed under the statutory demand by the defendants disputed at several levels and in my considered view there is not only a likelihood the intended winding-up petition may fail but it also goes towards its failure.

[70] The defendants' learned counsel also went to great lengths to argue on the plaintiff's corporate background in that the plaintiff is a wholly-owned subsidiary company of Petronas Refinery and Petrochemical Corporation and is part of Petronas thus falling within the purview of the Petroleum Development Act 1974 ("the Act"). That there lies a clear abuse of prerogatives powers by the plaintiff in exercising their statutory powers vested by the Act. Whilst learned counsel for the defendants admits that there is no documentary evidence in this originating summons to prove that the plaintiff is a part of the Petronas group of companies, nevertheless, he has invited the court to take judicial notice of this based on case law.

[71] I do not intend to go through the cases cited by learned counsel for the defendants nor conduct a detailed analysis of his submissions on this issue save to say that there is no basis that the Act applies to the plaintiff, even if there was such an alleged abuse of prerogatives powers.

[72] Further, with all due respect to learned counsel for the defendants, I find that this line of argument is irrelevant to the issue at hand on whether there is a disputable debt based on the statutory demand. It is the merits of the claim under the statutory demand that is in issue and not the plaintiff's alleged position as the ultimate subsidiary of Petronas.

Irreparable Damage

[73] It is trite that the presentation of a winding-up petition may and could cause irreparable damage to a company in terms of its business as well as reputation (*Fortuna Holdings* (*supra*); *Mobikom* (*supra*); and *Sime Engineering Sdn Bhd v. RM Leopad Sdn Bhd (No 2)* [2005] 5 CLJ 274).

[74] In *Sime Engineering* (*supra*) it was held as follows:

> *... most litigants who claim to be creditors would take the short-cut petition for winding-up route to enforce their claims rather than to have recourse to the common law courts.* Indeed, such heavy onus of proof if placed on the company would result in the companies court being inundated with a welter of winding-up petitions, *which may lead to irretrievable damage to a company's business and reputation, and far-reaching effects consequential upon the ensuing mandatory gazettal and advertisement entailed in a petition. The courts must firmly deprecate such proclivity for shortcuts in normal recovery of debts.*
>
> (emphasis added)

Conclusion

[75] In conclusion, I must again highlight the following events that have transpired and the steps taken by the defendants leading to the issuance of the statutory demand:

(i) initiating suit 72 (which suit includes progress claim no. 9 being the subject matter of the sum demanded in the statutory demand); and

(ii) initiating the CIPAA payment claim (which also includes a payment claim under progress claim no. 9).

[76] Whether deliberate or coincidental, having commenced both suit 72 and the CIPAA payment claim and after failing to proceed with these actions where suit 72 was stayed due to the stay order and in respect of the CIPAA payment claim, it did not proceed due to some defect in compliance with the applicable procedures or laws, the defendants then decided to issue the statutory demand.

[77] The timing of these actions taken by the defendants, suit 72 and the CIPAA payment claim, are in themselves evident that the defendants had considered that there are other processes that can be taken or even needs to be taken to claim the sum under progress claim no. 9.

[78] That in itself would affect the suitability of proceeding with a winding-up petition to resolve the matter or rather the defendants' claim.

[79] A similar type of conduct or acts were considered in the case of *Megasteel Sdn Bhd v. Perwaja Steel Sdn Bhd* [2008] 4 CLJ 352; [2008] MLJU 252 in which the Court of Appeal held as follows:

> Whether there was a breach of contract committed by the respondent is a serious question that requires investigation at a trial. From a reading of the affidavits, it is clear that there is a marked conflict as to the events that transpired between the parties with regard to the question that lies in the axis of the dispute. On one hand, we have the respondent saying that the sum of RM3,390,509.03 is undoubtedly due to it. On the other hand, the appellant claims that not all the goods that were supposed to be supplied to it arrived. *It is impossible at this stage to resolve this dispute based on affidavit evidence. It is also wholly unsuitable in our judgment, for this dispute to be resolved in a winding up proceeding based on the particular facts. There are already two actions and a counter-claim before the High Court. We think it is appropriate that these issues be tried and disposed of in those suits.*
>
> (emphasis added)

[80] Based on the reasons that I have set out above, I allowed both these originating summons and encl. 8 and after hearing arguments on costs, awarded costs of RM8,000 in favour of the plaintiff for this originating summons which costs includes the costs of encl. 8.